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In The
Supreme Court of the United States

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH
PRESIDENT OF THE UNITED STATES, et al.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE HONORABLE BILL OWENS, GOVERNOR OF THE STATE OF COLORADO, AND THE HONORABLE RICK PERRY, GOVERNOR OF THE STATE OF TEXAS, IN SUPPORT OF RESPONDENT UNITED STATES

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are current governors of States of the United States, who share or have shared responsibility for assuring the safety and protection of the people of their respective States. This Court has recognized that, "As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence." *Sterling v. Constantin*, 287 U.S. 378, 399 (1932).

The names and offices of the *amici curiae* include:

The *Honorable Bill Owens* is Governor of the State of Colorado. He has served as Governor of Colorado since 1998.

The *Honorable Rick Perry* is Governor of the State of Texas. He has served as Governor of Texas since 2000.

Each of the *amici curiae* is persuaded that these cases present issues of domestic security that are of grave importance to the chief executives of the States of the United States. Accordingly, pursuant to Supreme Court Rule 37.4, *amici curiae* respectfully submit this brief in support of the Respondents, including George W. Bush and the United States of America.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief either in whole or in part and no person, other than the *amici curiae* or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

As public officials with responsibility for the domestic security of their States, *amici curiae* believe that permitting Petitioners access to United States courts would detract from the ability of state chief executives to maintain law and order by imposing on the States and their individual citizens a serious and unnecessary threat to public safety. It is important to the chief executives of States that captured foreign combatants not be permitted to utilize the domestic courts of the United States either to hamper the nation's war effort through litigation or to exacerbate the threat to domestic security of the States that the detainees and their yet-to-be-subdued enemy allies continue to pose.

ARGUMENT

The pertinent question before this Court in both *Rasul v. Bush*, 321 F.3d 1134 (D.C. Cir 2003), *cert. granted*, 124 S. Ct. 534 (2003), and *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), is whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

As Respondents' briefs comprehensively address the constitutionality of the detention regime at the Guantanamo Bay Naval Base, Cuba, this brief will focus on the ramifications to the States of a decision permitting foreign nationals captured abroad in connection with hostilities to litigate their detention status in the United States courts prior to the end of the conflict in which they were captured

and the subjugation of the terrorist organizations with which they are allied.

I. THE WAR ON TERROR HAS TAXED GOVERNORS' ABILITY TO RESPOND TO DOMESTIC EMERGENCIES BY PROLONGING THE DEPLOYMENT OF STATE NATIONAL GUARD ELEMENTS

States often rely on their Air and Army National Guard units to help preserve domestic order in emergencies such as floods, fires, earthquakes, hurricanes, and riots. Since the war on terrorism began on September 11, 2001, state National Guard forces drawn from virtually every State have been deployed outside the country to serve in active military operations. National Guardsmen have also undertaken new homeland security duties, including guarding airports, stadiums, and other symbolic structures against potential terrorist attack.

These new uses of National Guard resources have reduced the number of Guardsmen available for governors to use in responding to traditional state emergencies. More than 300 Colorado Air and Army National Guardsmen are currently deployed under federal control in Iraq, Afghanistan, Kuwait, and Qatar. An even greater number of Colorado Guardsmen are mobilized for duty and serving in the war on terrorism within the United States. In Colorado, current deployments total nearly 25% of the Colorado Guard's assigned manpower,[2] a level of mobilization

[2] "Assigned" manpower indicates the actual number of individuals available, as opposed to "authorized" manpower, which is the number of individuals required in units for 100% effectiveness.

that necessarily degrades incident reaction times due to a reduced pool of available volunteers. Other States face even greater levels of deployment (some as high as 40% or more) and accordingly suffer the greater attendant reductions in response capability that those higher deployment levels entail. *See* Robert Tanner, *Governors Ask About Guard Use*, Denver Post 4A (Feb. 23, 2004). Since the National Guard Bureau, which oversees all reserve forces, has reported to the governors of the States that deployments will ultimately be managed so that one-quarter of each State's units will be deployed for federal needs, *id.*, the existing demands on the Army and Air National Guard in Colorado and other States are unlikely to abate until enough further progress has been made in the war against America's enemies to warrant a reduction in the federalization of state National Guard elements.

To the extent that the military goals of inhibiting threats to U.S. forces; disrupting enemy command relationships; and gathering intelligence are beneficial to the war effort, allowing the enemy detainees held at the Guantanamo Bay Naval Base to frustrate these objectives through litigation in the courts of the United States will contribute to an ongoing reduction in the availability of National Guard resources for governors to use in responding to domestic emergencies.

II. PERMITTING DETAINEES TO LITIGATE THEIR DETENTION STATUS IN UNITED STATES COURTS IMPOSES RISKS TO DOMESTIC SECURITY, WHICH GOVERNORS ARE RESPONSIBLE FOR MAINTAINING

A. If the detainees are granted access to United States courts, many of them will invariably end up in physical custody on United States soil

Because courts issuing writs of habeas corpus may compel the Department of Defense to bring prisoners before them for hearings, access to United States courts essentially means the Petitioners will in all likelihood need to be brought to the United States. Once Petitioners are granted access to United States courts, next friends of similarly situated detainees will inevitably seek review of other cases in the federal courts. In addition to these cases, brought originally in the District of Columbia Circuit, parties claiming to be next friends of the Guantanamo Bay prisoners have also sought the adjudication of some detainees' status in at least one other circuit court. *See, e.g., Coalition of Clergy, Lawyers & Law Professors v. Bush,* 310 F.3d 1153 (9th Cir. 2002); *Gherebi v. Bush,* 352 F.3d 1278 (9th Cir. 2003). The prospect arises that Guantanamo Bay detainees could end up before federal courts in many jurisdictions around the country. Given the large number of detainees currently being held at Guantanamo Bay; the unique individual circumstances surrounding the capture of many of them; and the likelihood in the face of ongoing hostilities that further detentions could result in increases in the detainee population, it is reasonable to suppose that, once federal courts are held to have jurisdiction over these cases, numerous States could be faced with the necessity of hosting one or more proceedings, any or all

of which might be expected to require the physical presence of Guantanamo Bay detainees for an indeterminate period of time within state borders.

B. Once on United States soil, the prisoners will themselves pose a risk to domestic security

1. Risk to communities of escape

The nature of the prisoners being held at Guantanamo Bay Naval Base creates an inherent risk to domestic security in the event of their escape. As Secretary of Defense Donald Rumsfeld recently stated in a Department of Defense News Briefing, "[The Guantanamo prisoners] include not only rank and file soldiers who took up arms against the coalition in Afghanistan, but they include senior Al Qaeda and Taliban operatives, including some who may have been linked to past and potential attacks against the United States, and others who continue to express commitment to kill Americans if released. Very simply, the reason for their detention is that they're dangerous." Donald Rumsfeld, Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce ¶¶ 25-26 (Feb. 13, 2004) <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

The risk of a detainee's escape, though small, is real. Escapes from state maximum-security correctional facilities occur commonly enough to justify the concern that one or more detainees might similarly elude federal civilian or military captors on United States soil. The risk of escape is aggravated by the fact that detainees brought to the United States for court proceedings will in all likelihood be subject to frequent transportation between locations, and

transportation periods characteristically present the greatest risk of escape. At the Guantanamo Bay facility, the potential for an escapee to harm civilians is substantially mitigated by the relative geographic isolation of the base. Such would not be the case, however, if a detainee were to escape on United States soil.

2. Risk to domestic security from associated persons

Proceedings examining the legality of a detainee's detention will inevitably require the presence of witnesses, including other detainees or third parties, who may themselves pose risks to domestic security for many of the reasons outlined above. Since the government could be subject to sanctions in any particular proceeding for failing to produce such witnesses as are within its control, *see United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003), permitting Petitioners access to the United States courts establishes a dynamic whereby the government's incentives in a potentially large number of cases will be misaligned with the interests of both public safety and national security.

3. Risk to national security from undesirable communication

Once detainees have been granted access to United States courts and proceedings have been initiated that require their presence on United States soil, there is little practical or desirable alternative to using the most highly secure federal facilities available within a particular jurisdiction to house them during the proceedings. Yet federal maximum-security custodial facilities today house

criminal inmates such as Ramzi Yousef (in Florence, Colorado), and Sheikh Omar Abdel Rahman (in Springfield, Missouri), among others, who have been convicted of committing terrorist acts against the United States in connection with Al Qaeda. One major national security interest governing the circumstances of incarceration of such individuals has been the goal of restricting potentially dangerous communication by these individuals both within and without prison,[3] including communication with their followers who may be represented among the Guantanamo Bay detainee population. Housing Guantanamo Bay detainees in the same federal facilities with these iconic terrorist leaders and others of their ilk for the duration of any legal proceedings risks the possibility of interaction and communication between the two that could ultimately damage United States national security.

[3] *See* Cam Simpson, *Terrorists Push Plots From Jail*, CHICAGO TRIBUNE (Nov. 19, 2001) (visited Feb. 26, 2004) <http://www.chicagotribune.com/news/chi-0111190247nov19.story?coll=chi-news-hed> ("El Sayyid Nosair, an Egyptian immigrant and follower of Rahman, played a key role in the 1990s bombing plots of New York landmarks, bridges and tunnels. The schemes were hatched despite Nosair being locked up at a New York City jail and a state prison, records show. At the time, Nosair was imprisoned for the murder on Nov. 5, 1990, of Rabbi Meir Kahane, a radical Zionist who promoted violence and the expulsion of Arabs from Israel.")

C. The physical presence of detainees on United States soil would create both incentives and opportunities for violent action by those supportive of the prisoners or opposed to the United States government

1. Foreign terrorists may retain the ability to strike inside the United States

The terrorist threat to the continental United States has not been eliminated, despite the nation's significant military and intelligence successes since September 11, 2001. Only 8 days before this Court's filing deadline for *amicus* briefs in these cases, Al Qaeda threatened the United States with further domestic attacks in a statement issued by Ayman al-Zawahiri, its top lieutenant to leader Osama bin Laden: "Bush, fortify your defenses and intensify your security measures, . . . because the Muslim nation, which sent brigades to New York and Washington, has decided to send you one brigade after another, carrying death and seeking Paradise." Neil MacFarquhar, *A Top bin Laden Aide Threatens New Attacks Against the U.S.*, N.Y. Times, Feb. 25, 2004 (visited Feb. 26, 2004) <http://www.nytimes.com/2004/02/25/international/middleeast/25ZAWA.html>.

The United States government takes such threats seriously and has told the American people as recently as February 24, 2004, that it believes Al Qaeda "sleeper cells" continue to exist and operate within the United States.[4]

[4] *See* Testimony of FBI Director Robert Mueller before Senate Select Committee on Intelligence, *Protecting National Security From a World of Threats: Director Mueller Testifies on Emerging Threats and*

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Substantiating this fear, the government in 2003 obtained convictions on charges of supporting terrorism in a case involving what President Bush called a "sleeper cell" comprised of six Al Qaeda-trained Yemeni Americans in Lackawanna, New York. *See* George W. Bush, President's State of the Union Address, para. 45 (Jan. 28, 2003) (visited Feb. 26, 2004) <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>. In light of these indicators, prudence requires governors to assume, and to urge this Court to share in the assumption, that there remain within the United States foreign terrorist operatives who are capable of carrying out large-scale terrorist acts on United States soil.

2. Court proceedings involving Guantanamo Bay detainees will present targets of opportunity with high symbolic and utility value for enemy terrorist cells in the United States

Assuming terrorist cells with the capability to conduct operations are present within the United States, there is every reason to anticipate that providing Petitioners (and, by extension, other Guantanamo Bay detainees) with access to United States courts would have an adverse impact on the domestic security of the States, as each resultant proceeding could come to serve as a target of

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the FBI's Response (Feb. 24, 2004) <http://www.fbi.gov/page2/feb04/threats022404.htm> ("This enemy still has the capacity to strike the U.S. both here and abroad with little or no warning . . . [A]l-Qa'ida retains a cadre of supporters within the U.S. which extends across the country.")

opportunity for terrorist violence. It is unnecessary to engage in speculation to understand the symbolic target value to Al Qaeda of wartime legal proceedings involving Guantanamo Bay detainees. Not only would such proceedings be highly visible media events, but the potential for civilian casualties in the kinds of urban areas most suitable for hosting proceedings of this nature would be large. Other, more utilitarian motivations for terrorist targeting of court proceedings involving Guantanamo Bay detainees are easy to postulate: Assassination of prisoners who could have information of value to the United States; forcible liberation of prisoners from United States custody; or violence against civilian jurors, judges, and bystanders for purposes of intimidation or retaliation. While the risk of violence in high profile proceedings can certainly be reduced through the employment of robust security measures, it can never be entirely eliminated.

D. Even if potential threats do not ultimately materialize, extreme security measures entailing large-scale disruption of daily life in urban centers will likely be required in order to adequately safeguard any domestic court proceedings involving Petitioners or other Guantanamo Bay detainees

Colorado's experience in hosting the Oklahoma City bombing trial of Timothy McVeigh and Terry Nichols, *United States v. McVeigh & Nichols*, Criminal Action No. 96-CR-68-M (D. Colo. 1996), in the capital city of Denver is instructive about the kinds of security measures that would be necessary to institute in a typical urban center in

order to host secure court proceedings involving Petitioners and other Guantanamo Bay detainees. The level of public disruption to be anticipated is of significant concern to *amici* in their role as governors, as is the residual elevated risk to public safety and domestic security that no amount of preparation can entirely mitigate. Security measures will need to be put into place to ensure both secure transportation and confinement logistics for Petitioners and the security of any court proceedings themselves. These measures will cause significant disruption of civic life wherever they may need to be instituted.

1. Disruption from transportation and confinement measures

Prisoners participating in proceedings, hearings, or advisements require transportation from detention facilities to courtroom facilities. Unlike routine prisoner transport and court proceedings, transport and proceedings involving high-threat prisoners require extensive planning and additional staffing as well as additional materiel in the form of vehicles, weapons, and a wide array of equipment, both technological and tactical. Cooperation is also required from a combination of federal, county and metropolitan agencies that represent all of the jurisdictions through which the transport will pass, in addition to state patrol officers on any highway route over which the State has jurisdiction.

In the Oklahoma City bombing trial, when the two defendants were transferred to Colorado from Oklahoma, county sheriff helicopters were required to transport the prisoners from the airport to a federal facility, and three Colorado National Guard helicopters were subsequently

needed to transport the prisoners across a large section of the State in order to house them in federal correctional facilities. Helicopter transportation of this sort cannot be accomplished without accompanying ground support along the flight path. Given that terrorists have routinely used shoulder-fired antiaircraft weapons to attack American military aircraft in Iraq, *see, e.g.*, Satinder Bindra, *5 Killed, 1 Wounded in Protests in Southern Iraq: U.S. Military Fear Black Hawk Downed By Enemy Fire*, CNN (Jan. 10, 2004) <http://www.cnn.com/2004/WORLD/meast/01/10/sprj.nirq.main/index.html>; and civilian aircraft in Africa, *see, e.g.*, BBC News, *Kenyan Police Find Mombasa Missiles* (Dec. 6, 2002) <http://news.bbc.co.uk/2/hi/africa/2552097.stm>; and are suspected by the federal government of having the weapons necessary to conduct similar attacks here in the United States, *see, e.g.*, United States Department of State, Bureau of International Information Programs, Press Release, *U.S. Believes Terrorists Still Pose Threat to Civil Aviation* (Nov. 5, 2003) <http://usinfo.state.gov/topical/pol/terror/texts/03110502.htm>, it is reasonable to anticipate that those who would act either in support of Petitioners and other Guantanamo Bay detainees, or to silence them, pose a significantly more tangible security risk than authorities confronted during the Oklahoma City bombing trial.

The commitment of ground support resources during air transport is significant even under ordinary circumstances, since it is not sufficient to simply have law enforcement agencies on unstructured standby. Ground support needs to be prepared to respond in the event of a problem with a helicopter or problems with any of the prisoners, and officers must be ready to take tactical action immediately at any point along the route of transit.

During the Oklahoma City bombing trial, this necessity meant that the Colorado State Patrol, sheriffs in several jurisdictions, and many local police departments were compelled to commit resources to security duty that would otherwise have been dedicated to normal responsibilities. Furthermore, this commitment is not likely to be a singular occurrence in the event of involved proceedings. During the Oklahoma City bombing trial, for example, it was necessary to move the prisoners back and forth from the United States Courthouse in Denver to secure detention sites twice a day for several weeks. Proceedings involving Petitioners or other Guantanamo Bay detainees are likely to consume an even greater share of state and local law enforcement resources, all to the detriment of public safety.

To the extent air transportation is non-optimal, a transport using vehicles alone can be similarly problematic. Regardless of intelligence indications about the likelihood of an attack on a transport caravan, secure transit requires that vigilance and proper practices be maintained at all times. The goal of moving prisoners from one location to another with few or no stops, thereby allowing little or no opportunity for targeting any of the vehicles, means that moderate to high speeds of travel must be maintained. This requirement in turn necessitates traffic blocking at intersections along the transit route. The very nature of secure caravan transport – several vehicles clustered together and traveling at a higher than normal rate of speed – is disruptive to traffic on highways and city streets.

As a practical matter, early morning and late evening transport can be used to avoid some of the traffic issues associated with transporting high-risk prisoners, but these

options are poor for several reasons: First, a courthouse is not generally a safe setting for holding a high-risk prisoner, as it is a non-maximum security environment. Second, transporting prisoners in less congested circumstances raises the risk of successful attack. Third, the pattern of traffic volumes in metropolitan areas will require leaving the federal courthouse late at night and necessitate returning again in the very early morning hours. These scheduling requirements do not allow prisoner needs to be met and will have a detrimental impact on all state and local law enforcement agencies that may be forced to change regular staffing arrangements during those time periods when law enforcement resources are most in demand for the performance of ordinary essential duties.

2. Disruption from measures necessary to secure the proceedings

Any proceedings involving Petitioners or other Guantanamo Bay detainees that needed to be conducted in the federal courthouse in Denver would require security measures that could literally shut down portions of Colorado's capital city. The United States Courthouse in Denver is in close proximity to a post office, bus station, several private office buildings, the former United States Courthouse, the federal office building and the historic Federal Appeals Court. In front of the Appeals Courthouse is a Regional Transportation District light-rail stop that is used by downtown commuters. The complex includes the Federal Customs House building, which houses the United States Bankruptcy Court, the intake location for military recruiting in the region, federal offices, and a day-care center.

The overall scene, if court proceedings for Petitioners or other Guantanamo Bay detainees were to be held in the District Courthouse, would be that of a federal courthouse surrounded by government and private office buildings that, in the daytime, would contain thousands of occupants. Every sidewalk in the immediate area would be congested with downtown workers, international media, and federal and local law enforcement. Vehicle traffic in and out of downtown in that area would be slow and often stopped. This environment would present a significant opportunity for terrorist activity. The alternative, blocking off a six square-block area at the edge of Downtown Denver, would bring much of the downtown area comprising Denver's economic center to a halt for weeks. Furthermore, since the federal government is only responsible for the interior and immediate exterior of courthouses, securing the area would be the responsibility of the Denver Police Department. During the Oklahoma City bombing trials, this responsibility had a tremendous impact on the staffing and budget of the Denver Police Department. An even higher-threat proceeding would of course have a much greater impact.

This concern arises for all States where proceedings may be held. For example, federal courts are located in all major urban areas of Texas including Austin, the state capital, and Houston, a major port for the nation. Each court is located centrally in each city and the disruption and dangers due to security issues would be overwhelming and would unnecessarily endanger the populace and the economy of Texas and the United States. In Austin, the federal courthouse already has required the closure of a downtown street causing disruption in the traffic flow and the federal courthouse is located within walking distance

of state governmental buildings including the capitol, the major county hospital, and the University of Texas.

3. Potential for multiple proceedings in different locations

The security concerns associated with proceedings involving Petitioners or other Guantanamo Bay detainees do not, of course, differ qualitatively from the concerns that exist whenever States must deal with high-risk prisoners in high-profile proceedings. However, it is important for this Court to be aware that governors consider Petitioners, due to their potential affiliation with a global terrorist network, to pose risks that are of a different order of magnitude than would ordinarily be the case for a more typical high-security trial or criminal proceeding.

Even with all of the disruption that it entailed, the Oklahoma City bombing trial posed a manageable security risk at least in part because it was a "one-off" event, that is, a relatively unique occurrence. The United States naval base at Guantanamo Bay, however, currently holds in excess of 600 enemy combatants from more than 40 countries, at least some of whom (if not the large majority), are likely to be affiliated with Al Qaeda. A ruling favorable to the Petitioners raises the prospect of literally hundreds of separate proceedings involving extremely high-risk individuals transpiring nearly simultaneously in multiple jurisdictions. To make matters worse, given that the war on terror is not yet won, the number of detainees currently on hand at the Guantanamo Bay Naval Base could only be a starting point, rather than an ending point; and the variation in individual detainee circumstances

could become much more diverse, rather than less. Thus the threat to the States' domestic security that could result from a ruling favorable to Petitioners is essentially open-ended. This presents a grave challenge to governors in the fulfillment of their responsibilities as chief executives. *Amici curiae* accordingly urge this Court to consider the ramifications of its decision in these cases, since the effect on governors' ability to perform their essential duty of maintaining domestic security is likely to be profoundly affected by any outcome in Petitioners' favor.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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